Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 75 979

OCTOBER TERM, 1975

LEVA ADKINS, Administratrix of the Estate of EVERETT ADKINS, Deceased,
Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, W. B. THROCKMORTON, and R. V. LOFTUS,
Respondents.

MOTION TO DISMISS

With Supporting Brief; and Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Illinois

BENNETT A. WEBSTER
Des Moines, Iowa

EUGENE R. JOHNSON
ROSS E. CANTERBURY
Peoria, Illinois

WILLIAM M. WALKER
Rock Island, Illinois

Attorneys for Respondents

GAMBLE, RIEPE, BURT, WEBSTER & FLETCHER
2600 Ruan Center
Des Moines, Iowa 50309

WESTERVELT, JOHNSON, NICOLL & KELLER
1400 First National Bank Building
Peoria, Illinois 61602

CORYN and WALKER
312 First National Bank Building
Rock Island, Illinois 61201

Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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MOTION TO DISMISS

Respondents move that the Petition for Writ of Certiorari to the Supreme Court of Illinois be dismissed, pursuant to Rule 16, as not having been filed within ninety days from the entry of the final Judgment or Decree, as required by 28 USC 2101.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The opinion of the Supreme Court of Illinois in this case was filed June 4, 1973 and appears at 54 Ill. 2d 511, 301 NE2d 729. Rehearing was denied on September 27, 1973.

The Supreme Court of Illinois issued its mandate directing that the case be dismissed on October 10, 1973. That was the final Judgment or Decree from which the ninety-day period for filing a Petition for Writ of Certiorari to this Court began to run. (See Appendix).

The first Petition herein asserted that her Petition sought to review a Judgment of the Supreme Court of Illinois entered June 4, 1973. Her second or substituted Petition, asserts she seeks review of a Judgment of the Supreme Court of Illinois entered October 19, 1975. The correct date of the Judgment of the Supreme Court of Illinois is the date of the mandate, the Final Order, dated October 10, 1973. Her Petition is, therefore, not timely.

Petitioner asserts that on October 26, 1973 the United States District Court entered an Order pursuant to Stipulation precluding the entry of Judgment in the Circuit Court of Rock Island County, Illinois until the final determination of threshold jurisdictional questions was determined by the collateral civil rights litigation instituted by the Petitioner against the Justices of the Court of Illinois (herein referred to as *Adkins v. Underwood*). That Stipulation did not involve the Respondents here. (See Appendix).

The stay of the entry of the Judgment in the Illinois Circuit Court (Trial Court), however, did not stay the time for filing a Petition for Writ of Certiorari under 28 USC 2101. Under that statute, a Petition for Writ of Certiorari intended to bring any judgment or decree in a civil action before the Supreme Court for review shall be taken within ninety days after the entry of the final order, judgment, or decree.

In determining what is a final judgment or decree within the meaning of the Federal statute, this Court is controlled not by the designation applied to it in the State practice, but by

Federal law. *Cole v. Violette*, 319 US 581; *Department of Banking v. Pink*, 317 US 264; *Gorman v. Washington University*, 316 US 98.

The final Judgment in this case was either the denial of rehearing by the Supreme Court of Illinois on September 27, 1973, or the issuance of the mandate on October 10, 1973. The filing of a Judgment dismissing the case in the Circuit Court is a mere ministerial act which cannot effect the time for filing a Petition for Writ of Certiorari.

Directly in point is *Cole v. Violette, supra.* In that case the Supreme Judicial Court of Massachusetts on December 4, 1942, ruled that the case had become moot. (312 NE2d 400).

On the same day that Court sent to the Superior Court from which the appeal was taken a rescript which ordered the Clerk of that Court to enter a final Decree that the case was dismissed. The rescript was filed in the Superior Court on the same day, December 4, 1942, which on January 7, 1943, entered a Decree as had been directed by the Supreme Court. Applications for allowance of an appeal to this Court presented within three months after December 4 were denied, but an application presented to another Associate Justice of this Court on March 6 was allowed. This Court then states:

> "* * * But this last application was not timely if the time to take an appeal ran from December 4th. *Matton Steamboat Co. v. Murphy*, 319 U.S. 412.
>
> "Massachusetts local practice regards the decree entered by the Superior Court on the rescript, rather than the order of the Supreme Judicial Court contained in the rescript, as the 'final decree' in the case. See *Boston v. Santosuosso*, 308 Mass. 189, 194, 31 N.E.2d 564; *Carilli v. Hersey*, 303 Mass. 82, 84, 20 N.E.2d 492. But in determining what is a final judgment or decree within the mean-

ing of § 237 of the Judicial Code, 28 U.S.C. § 344, we are not controlled by the designation applied to it in state practice. *Department of Banking v. Pink*, 317 U.S. 264, 268; *Gorman v. Washington University*, 316 U.S. 98, 101. The order of the Supreme Judicial Court of Massachusetts incorporated in its rescript was an order of the same nature and with the same incidents as those of the highest courts of other states which we review. It was an order of the court, and one which finally disposed of all the issues in the case, leaving nothing to be done but the ministerial act of entering judgment in the trial court. The appeal is dismissed on the ground that it was not applied for within the time provided by law. * * *"

To the same effect is *Department of Banking of Nebraska v. Pink*, 317 US 264, where this Court held that a Petition for Writ of Certiorari had not been timely filed. In that case this Court went on to caution the Bar in regard to this practice, stating:

"Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton v. Fowler*, 91 U.S. 142, 146. In reliance upon the early decision in Green v. Van Buskerk, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order

of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 U.S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts v. Hoagland*, 105 U.S. 701, 702, and *Clark v. Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of § 237 of the Judicial Code, a final judgment reviewable here.

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick v. Superior Court*, 278 U.S. 575; *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Comm'n.*, post, p. 588), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court (see *Gorman v. Washington University*, 316 U.S. 98). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established.

"It was for this reason that we recently held that the three-months requirement had not been complied with in *Monks v. Lee*, post, p. 590, and *Bunn v. Atlanta*, post, p. 666, in which cases judgments were brought here for review from the courts of California and Georgia and in each of which a Petition for rehearing is today denied, post, p. 711. The petition for certiorari in this case must likewise be denied for want of jurisdiction."

The situation is identical here. The Order of the Supreme Court of Illinois is incorporated in its mandate of October 10, 1973. That was the Order which finally disposed of all of the issues in the case, leaving nothing to be done but the ministerial act of entering Judgment in the Trial Court. The stay of the Judgment in the Trial Court by the United States District Court in *Adkins v. Underwood*, a collateral civil rights proceeding cannot effect the time for appeal or for filing a Petition for Writ of Certiorari in this Court.

If there can be any further doubt that the mandate of the Supreme Court of Illinois issued on October 10, 1973 is the "appealable order" in this case, it should be noted that the United States District Court for the Northern District of Illinois, Eastern Division, in its Memorandum Opinion and Order dismissing *Adkins v. Underwood*, stated: "This is not an action to enjoin a proceeding pending in a state court. This is an action to enjoin the enforcement of a *final judgment* rendered by the highest Court of the State of Illinois." (Emphasis supplied). (Pet., p. 49).

The United States Court of Appeals for the Seventh Circuit, in affirming that Order, stated in its opinion: "Plaintiff is asking an inferior federal court to order the Supreme Court of Illinois to vacate its *judgment* and reinstate a favorable trial court verdict and judgment." (Emphasis supplied). (Pet., p. 55).

The Petitioner has by her own choice and that of her counsel pursued for more than two years an elusive remedy claiming a violation of Petitioner's civil rights under 42 USC 1983, instead of filing a Writ of Certiorari to this Court after the Judgment of the Supreme Court of Illinois was filed.

Under the circumstances, she is now too late to pursue this remedy. Her Petition must be dismissed or denied for want of jurisdiction, not having been applied for within the time provided by law.

REASONS FOR DENYING THE WRIT

I

The Questions Presented by Petitioner's Petition for Writ of Certiorari Are *Res Judicata*, Having Been Determined by Adkins v. Underwood, 270 F Supp. 510 (N.D. Ill. 1974) Aff. 520 F2d 890 (C.A. 7th 1975); Cert. Denied No. 75-572 (Dec. 8, 1975).

Whether it be deemed *res judicata* or estoppel, the plain fact is that the Petitioner has already presented the questions here raised in her appeal to the Seventh Circuit and her Petition for Writ of Certiorari to this Court in *Adkins v. Underwood*, 520 F2d 890, cert. denied No. 75-572 (Dec. 8, 1975). This Petition was nothing more than a second attempt to persuade this Court to take jurisdiction on the same issues.

Petitioner here raises two issues: That Petitioner has been denied privileges guaranteed by Article IV, § 2 of the Constitution; and that she has been denied due process by being denied a hearing on *forum non conveniens*. The only difference between these contentions and those made before the Court of Appeals in the collateral litigation is that here they are presented in reverse order. The Court of Appeals stated Petitioner's contentions in *Adkins v. Underwood, supra*, as follows:

> "Plaintiff predicates her 1983 claim upon two alleged constitutional violations. First, she argues that she has been denied due process. Specifically, she contends that a hearing must be held on the questions of the convenience of alternative forums and her good faith in joining the Illinois residents as defendants." (Petitioner's Pet., p. 56); and
>
> "The second constitutional peg on which plaintiff purports to hang her 1983 claim is the privileges and immunities clause of Article IV, § 2. She asserts that the

> decision of the Supreme Court of Illinois denied her access to the Illinois courts on the same footing as Illinois citizens." (Petitioner's Pet., p. 57).

These are the same contentions that Petitioner makes in her Petition here. They have been adjudicated. The Court's attention is invited to Petitioner's Petition for Writ of Certiorari in *Adkins v. Underwood*, which show the same issues raised. Certiorari has already been denied. She is not entitled to relitigate these issues.

II

Petitioner Has Had an Adequate Hearing and Illinois' Well-Established Policy of Allowing Non-Residents Access to Illinois Courts and of Even-Handed Applications of the Doctrine of *Forum Non Conveniens* Has Been Adjudicated by the Federal Courts. Thus, There Is No Substantial Question Presented, But Only a Question of State Law.

Petitioner repeatedly asserts that she has been denied a hearing on the question of the proper *forum* and has thus been denied due process. This is not the case. The defendant Railroad filed a Motion to Dismiss the Illinois action on the doctrine *of forum non conveniens* on March 15, 1968. The docket entries reveal that the hearing on this Motion was postponed on several occasions at the request of plaintiff's counsel. The docket entries of the Rock Island County Circuit Court also show that on August 12, 1968 (Plaintiff's) Motion for Leave to Amend to Bring Two Additional Defendants was granted *nunc pro tunc*. On the same date, August 12, 1968, the docket contains the following entry: "Motions to Dismiss filed 3-15-68. *Heard and denied*. See Ord. DHM." (Emphasis supplied). The initials "DHM" on the docket are those of Dan H. McNeal, Circuit Judge of Rock Island County, Illinois, one of the defendants in *Adkins v. Underwood*. (See Appendix).

It thus appears that there was in fact a hearing on the doctrine of *forum non conveniens* where counsel for both parties were represented.

The entire record is replete with all of the indicia for a decision on *forum non conveniens* under the doctrine of *Gulf Oil Corp. v. Gilbert*, 330 US 501 (1947). The place of accident, the residences of all of the witnesses and parties, the conditions of the trial and appellate dockets, the location of records, the residences of trial counsel and all other matters were known to Judge McNeal, and to the Supreme Court of Illinois, in deciding the Illinois doctrine of *forum non conveniens*. (See Affidavits attached to Defendants' Motion printed in Appendix).

Respondents' post-trial motions raised the question of *forum non conveniens* both on behalf of the Railroad and the Respondents, Throckmorton and Loftus. The matter was fully briefed and argued by both parties and all of the necessary indicia set forth in the record before the Illinois Appellate Court. The matter was again briefed and argued before the Illinois Supreme Court.

Counsel for Petitioner frankly stated in oral argument to the Supreme Court of Illinois that he did not like the Ruling of Judge Roy L. Stephenson, United States District Judge (now Judge for the Court of Appeals, Eighth Circuit) on a Motion in Limine to restrict introduction of evidence made on the eve of the trial in Federal Court in Des Moines. It was for that reason that Petitioner moved for continuance of that trial, which was resisted by the Respondent Railroad.

Petitioner's assertion (Pet. p. 4) that it "was agreed by both parties that the (Federal) suit should be discontinued" constitutes twisting of the record. Petitioner's counsel requested Respondent's counsel to sign a Stipulation for Dismissal without prejudice of that case, as at that stage it could only be dismissed

on Stipulation or by Motion. Respondents' counsel complied, being glad to dispose of a half million dollar lawsuit against their clients.

CONCLUSION

Petitioner has been accorded a hearing and due process on the question of *forum non conveniens*, which is a question of Illinois State law. This Court has denied certiorari once in this matter, and should do so again. Actually, this matter should be disposed of on Respondents' Motion to Dismiss and an Order entered indicating the reasons for the dismissal.

Respectfully submitted

BENNETT A. WEBSTER
Des Moines, Iowa

EUGENE R. JOHNSON

ROSS E. CANTERBURY
Peoria, Illinois

WILLIAM M. WALKER
Rock Island, Illinois

Attorneys for Respondents

Dated: Des Moines, Iowa, February 9, 1976